December 1, 1999

In the Matter of:		
Marilyn H. Baird (Widow of James M. Baird, III) Claimant		
v.		
General Dynamics Corporation Employer/Self-Insurer	Case Nos.	1999-LHC-1311/1312
	OWCP Nos.	1-142750/122498
and		
Director, Office of Workers' Compensation Programs, United States Department of Labor Party-in-Interest		

Appearances:

Carolyn P. Kelly, Esq.
For the Claimant

Peter D. Quay, Esq.
For the Employer/Self-Insurer

Merle D. Hyman, Esq.
Senior Trial Attorney
For the Director

Before: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on August 27, 1999 in New London, Connecticut at which time all parties were given the opportunity to present evidence and oral arguments. Post-hearing briefs were not requested herein. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit and RX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	Item	Filing Date
CX 28A	Attorney Kelly's letter filing	09/03/99
CX 29	Claimant's Form LS-203, dated January 24, 1992, relating to his alleged injury prior to July 2, 1991	09/03/99
RX 14	Attorney Quay's letter clarifying the nature of the benefits received by Decedent from October 29, 1990 through January 25, 1998	10/06/99
CX 30	Attorney Kelly's letter filing	11/12/99
CX 31	Claimant's brief, as well as her	11/12/99
CX 32	Fee Petition (1999-LHC-1312)	11/12/99
CX 33	Fee Petition (1999-LHC-1311)	11/12/99
CX 34	The parties' stipulation as to Decedent's permanent partial impairment herein	11/17/99
RX 15	Employer's Brief	11/12/99
RX 16	Employer's comments on the fee petition	11/23/99

The record was closed on November 23, 1999 as no further documents were filed.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.

2. Decedent and the Employer were in an employee-employer relationship at the relevant times.

3. Claimant alleges that her husband suffered an injury on October 29, 1990 in the course and scope of his employment.

4. Claimant gave the Employer notice of the injury in a timely manner.

5. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion.

6. The parties attended an informal conference on August 12, 1999.

7. The applicable average weekly wage is in dispute. If Decedent's average weekly wages for the fifty-two (52) weeks prior to his injury, then his average weekly wage is $1,143.00.

8. Section 8(c)(23) of the Act applies to these claims.

9. Marilyn H. Baird ("Claimant") is the Decedent's eligible surviving widow.

The unresolved issues in this proceeding are:

1. Whether Decedent's pulmonary condition constitutes a work-related injury.

2. Decedent's average weekly wage.

3. The applicability of Section 8(f) of the Act.

Summary of the Evidence

James M. Baird ("Decedent" herein), who was born on September 20, 1935, and who had a high school education and an employment history of manual labor, began working on October 1, 1953, at age 18 (RX 5), as a pipefitter apprentice at the Groton, Connecticut shipyard of the Electric Boat Company, then a division of the General Dynamics Corporation ("Employer"), a maritime facility adjacent to the navigable waters of the Thames River where the Employer builds, repairs and overhauls submarines. He worked as an apprentice until January 17, 1955 and he "was transferred to the design department as a draftsman apprentice." As a pipefitter, Decedent directly worked with, handled and cut asbestos, Decedent remarking that he worked on the **U.S.S. Nautilus**, the first nuclear-powered submarine, as well as on the overhaul of the **U.S.S. Diablo** and the **U.S.S. Gaito**. He also worked in the insulation department for thirty (30) days where he was also exposed to asbestos dust and fibers. Decedent spent about seventy (70%) percent of his work day on the boats as a pipefitter cutting and installing asbestos as insulation around the pipes, machinery and equipment. (CX 28 at 3-10)

The cutting and application of asbestos caused dust and fibers to "float in the air" of the work site. Decedent remained in the Design Department until his last day of work at the shipyard on October 29, 1990, at which time he was Chief of Design. He became a salaried employee in March of 1973 when he became part of management. Decedent worked as design liaison from 1956 until 1964

and after that he worked “primarily in the design room as a designer.” He still went on board the boats as a designer after 1957, spending about eighty-five (85%) percent of his workday on the boats. He continued to be exposed to asbestos dust and fibers whenever he went on the boats, especially when he worked in close proximity to the welders and burners “to look at various corners and problems.” Sometimes there was so much dust in the work environment that it seemed “(c)loudy at times” and he wore no face mask or respirator. He became a Design Supervisor in 1973 and Chief of Design in March of 1986. He has worked on both new construction and overhauls at the shipyard. He was also exposed to asbestos dust and fibers while he worked for awhile at the Employer’s Fore River Shipyard in Quincy, Massachusetts in 1964. He continued to go on board the boats throughout his employment for this Employer, although towards the end he might have gone on the boats twice per month. (CX 28 at 11-23, 27)

Decedent also was sent on special assignments for the Employer to Charleston, South Carolina, to Rota, Spain, to Scotland, Norfolk Naval Shipyard and Portsmouth Naval Shipyard, as well as Guam. He believes that he was exposed to asbestos during these tours of duty. Fiberglass was used in place of asbestos beginning in the late 1970s or the early 1980s, although he continued to be exposed to asbestos during the overhaul or refurbishing of an already-commissioned submarine into the late 1970s. He may also have been exposed to asbestos until 1990 or so as the building in which his office was located underwent renovations and the asbestos insulation was removed by “outside vendors.” Dust was flying around the building and “the company health department (was) up there taking atmospheric samples.” (CX 28 at 27-37)

Decedent began experiencing cardiac problems in 1971, at which time he had a myocardial infarction, and was treated at Lawrence and Memorial Hospital (L&M) by Dr. Paul Sutton, his family doctor, and Dr. Gibstein, his cardiologist. Dr. Sutton passed away in 1987 and Dr. Peter Gates became his family doctor. Decedent began smoking cigarettes at age 18, smoked less than one back per day and stopped in the fall or the winter of 1984 or 1985, or at age fifty. The heart attack kept him out of work for six weeks or so and occurred apparently as he experienced “severe chest pain” at night and he was taken to L&M. He was also hospitalized at L&M in 1975 “with angina” for five days. He was out of work for two weeks. In 1984, while driving away from a theater, he went into “cardiac arrest,” and “they jump started” him and an ambulance took him to L&M, and then transferred to Brigham and Women’s in Boston. He was discharged on December 5th, “rehospitalized again on the 7th with a cardiac arrest” and he “was transferred back up to Boston.” Bypass surgery, originally scheduled for December 17th, was advanced because of the emergency and he underwent triple coronary bypass. Decedent took several prescriptions for his cardiac condition and Dr. Gates coordinated his medical care. He saw see Dr. Gates every three months or so for his “heart condition.” Dr.

Gates, advising Decedent that his cardiac condition was “severe enough, coupled with (his) other problems,” recommended that Decedent stop working, Decedent testifying that at time he “was generally very fatigued, and ... things just weren’t going very well for (him) at the time. And he (the doctor) wanted (him) to relax, take it easy. Then one thing led to another, and we started talking about the possibilities of disability or retirement from work,” Decedent remarking that he “was too young to retire.” At that time decedent was fifty-five (55) years of age. Two weeks later, on October 29, 1990, he stopped working. At the time of his July 6, 1992 deposition, Decedent was receiving long-term disability benefits from the Employer because of his heart problems, Decedent remarking, “Well, the basic reasons that we’re using to establish the disability was (his) amputation and the cardiac stress caused by it.” In December of 1983 Decedent underwent a femoral bypass of the right leg” to correct “severely restricted” right leg circulation caused by “advanced arteriosclerosis,” a condition which was “very painful, cramping” and made it difficult for him to walk. (CX 28 at 38-49)

Decedent had been diagnosed with diabetes in 1975 and he was then prescribed insulin therefor. He had another femoral bypass of the right leg in 1985, as well as a redoing of the graft in February of 1988. On April 12, 1988 Decedent’s right leg was amputated below the knee and he returned to work on July 5, 1988 with a right leg prosthesis. On October 29, 1990 Decedent “didn’t generally feel right,” he “was very fatigued, a little nauseous,” and he told his wife, “I’m going in today. I’m going to call the doctor and see what’s going on.” According to Decedent, “before (he) left Electric Boat (he) had walked flights of stairs to get to (his) work station in the morning” and “towards the end (of his employment) there, (he) was becoming winded.” He stopped working on October 29, 1990 because he “had a general fatigue, extreme fatigue by mid-afternoon” because of the stairs “and all the walking (he) had to do internally in the office” ... (a)nd basically there was a lot of fatigue involved. Decedent went to the Occupational Health Clinic (OHC) for his breathing problems in May of 1991 and a lung biopsy was performed. Other tests were done at OHC. Decedent’s long-term disability benefits ended in October of 1992 and at that time he was formally retired on October 28, 1992. (CX 21) He had been receiving Social Security Administration disability benefits since May 1, 1991, an award made without a hearing. Decedent had personal knowledge of his asbestos exposure until at least 1972 but such exposure could have continued until his overhaul work ended in 1975. (CX 28 at 50-65)

Claimant was referred to the Occupational Health Center at Lawrence & Memorial Hospital (OHC) and Dr. Charlene Kaiser, Occupational Health Physician, sent the following letter to Claimant on April 14, 1992 (CX 12):

“You were first seen at the Occupational Health Center on 10 June, 1991, having been referred by your family physician because you had recently developed wheezing. The evaluation included a medical and occupational history, physical examination, chest x-rays with B-reading, complete pulmonary function studies, and two high resolution CT scans performed at Yale University.

“Your occupational history as I understand it is that you worked at the Electric Boat Division of General Dynamics from 1953 to 1990 as a pipefitter apprentice for the first fifteen months and subsequently worked as a draftsperson. You stopped work in late 1990 because of multiple medical problems. You had asbestos exposure as a pipefitter for fifteen months, and occasional exposure as a draftsperson and designer.

“Your past medical history as I understand it is that you have had diabetes mellitus for the past twenty years, which has been treated with Insulin for the past sixteen years. You have arteriosclerotic cardiovascular disease with a history of myocardial infarction, followed by a coronary artery grafting procedure. You had an episode or pneumonia in 1986, and had a chest CT scan at the Lawrence & Memorial Hospital at that time. You are taking numerous medications for your heart disease and diabetes.

“You smoked less than one pack of cigarettes daily for thirty-five years, stopping in 1985. Your social history is otherwise unremarkable. Your family history is positive for diabetes, arteriosclerotic heart disease, and brain cancer.

“You stated that you cough occasionally, and developed wheezing several weeks ago which had mostly resolved by the time of your initial clinic visit. Your review of systems was otherwise unremarkable.

“Your physical examination showed corneal clouding on the right and vascular proliferation of the left fundus. Harsh rales were heard at both bases to mid-lung fields. No wheezing was appreciated. Examination of your heart revealed an S4 gallop, but was otherwise unremarkable. There was a right below-the-knee surgical amputation and evidence of peripheral vascular disease in the left lower extremity.

“Your chest x-rays showed diffuse pleural thickening on the right, and a distribution of parenchymal densities of 1/0 by the ILO classification scheme. Your pulmonary function studies showed moderate-to-severe obstructive disease, moderate restrictive disease, and a severely decreased diffusing capacity. It was on the basis of those findings that Dr. Amy Hopkins recommended that you have a high resolution CT scan at Yale. This was initially performed on 20 June, but because it was technically unsatisfactory, was repeated on 2 July. This CT scan showed clear interstitial fibrosis or asbestosis which was more pronounced at

the extreme lung bases. There was associated pleural thickening, and the possibility of rounded atelectasis of the right lower lobe medially. The radiologist at Yale-New Haven Hospital recommended a needle biopsy. You elected to have that performed locally, and this biopsy was non-diagnostic. When I last saw you on 12 February, we discussed your abnormal results, and you stated that Dr. Gates will be following this lung lesion with serial CT scans. We also decided that you will phone the clinic in April or May for a return visit..., according to the doctor.

Later that year Claimant was referred to Saint Francis Hospital and Medical Center in Hartford and Dr. Thomas J. Godar, Chief, Section of Pulmonary Diseases, sent the following letter, dated September 21, 1992, to the Employer's workers' compensation adjusting firm (RX 12):

"**CHIEF COMPLAINT:** The patient is a 57 year old white male who has been a chief of design at the Electric Boat Shipyard on medical leave of absence since 10/29/90 under the care of Dr. Peter Gates of Ledyard, CT, his medical leave of absence being based on status post cardiac surgery and amputation of the right leg for severe peripheral vascular disease, the patient not in interim retraining at the present time and referred for evaluation to establish diagnosis, level of impairment if any, and if there is any relationship between his current medical status and previous occupational exposures.

"**OCCUPATIONAL HISTORY**

1953 - 1992 He began work at the Electric Boat Shipyard as a pipefitter apprentice for approximately 18 months, working in the pipe insulation department for 30 days, then becoming a draftsman apprentice spending 5 years in the office and on the submarines. He was primarily (a) design liaison and 85% of his time was spent on the submarines during construction. His exposure was largely to new construction and then there was some overhaul activity on an intermittent basis. In approximately 1964 he was reassigned to the design room and he would make 2 or 3 trips a week onto the submarines but did not have regular exposure. In 1973 he became a supervisor and was once again on the submarines intermittently perhaps once a week for 2 or 3 hours, the remainder of his time being spent in the office area until 1986. In 1986 he became chief of design and made no further submarine visits that would have provided significant asbestos exposure. He was unaware of any abnormality in his chest x-ray until March of 1991 when chest congestion with wheeze led to a physical examination by Dr. Peter Gates and he was then referred to Dr. Charlene Kaiser of the Occupational Health Unit at Lawrence and Memorial Hospital for an evaluation. There was a long history of chest x-rays having been obtained at the Electric Boat Shipyard but he was unaware of any abnormalities and was not aware of any chest x-ray in the most recent 10 years. He is aware that a chest film at the Lawrence and

Memorial Hospital in 1986 revealed pneumonia. The patient states that retirement disability was recommended based on status post coronary artery bypass graft for coronary artery disease as well as amputation of the right leg below the knee with diabetes mellitus, insulin dependent.

"**HISTORY OF PRESENT ILLNESS:** The patient smoked cigarettes at a level of approximately 15 or more cigarettes a day from age 18 to age 50 with a rare cigarette use since, providing an exposure of at least 30 pack years. He did have some symptoms after respiratory infections including persistent cough and sputum production and medical records do note that in the 1980s he was frequently treated for bronchitis. He did have morning cough and sputum production during his smoking years but denies any dyspnea on exertion. In fact, he feels that recurrent bronchitis was not a problem until he had pneumonia for which he received treatment at the Lawrence and Memorial Hospital in late 1986 or early 1987. The first available medical records in 1971 note the presence of diabetes and a history of erythema nodosum. No mention is made of a possible sarcoidosis. A chest film on 08/03/71 revealed that the previously noted infiltrate at the right base had cleared and lung fields were normal. The medical records of 07/24/72 indicate the patient had been hospitalized for coronary artery disease and was still under the care of his internist. In 1976 he spent 2 weeks at the Lawrence and Memorial Hospital being evaluated and treated for chest pain. On 10/06/76 the patient received a letter from the Electric Boat Division indicating that a routine physical examination and chest x-ray had been interpreted as revealing an abnormality. The records document the presence of a myocardial infarction in 1970. Available reports do not delineate any chest x-ray abnormalities.

Dr. Godar then reviewed Claimant's other medical records and reported as follows on Claimant's diagnostic tests (**Id.**):

"**LABORATORY STUDIES: Pulmonary Function Studies** - Pulmonary function tests on 09/21/92 reveal airway obstruction that is severe is (SIC) degree and which shows a minimal response to bronchodilator, associated with some distention but with total lung capacity only 62% of predicted, consistent with a moderate associated restrictive defect. The diffusion capacity is severely reduced at 7.47 or 22% of predicted, even lower than in previous recent studies.

"**Chest X-Rays** - The earliest available chest x-rays of 03/23/88 and 04/12/88 are consistent with substantial pleural effusion on the right, a large heart and evidence of coronary artery bypass graft with increased interstitial markings which probably represent congestive heart failure and are not specific for interstitial fibrosis. A film on 05/28/91 does suggest some interstitial fibrosis in the lower lung fields but in the absence of significant pleural disease or pleural plaques and without evidence for

calcification. This is sufficient to raise some question as to the etiology for the interstitial markings since they are not typical for asbestosis.

CT scans of the chest performed on 06/20/91, 07/02/91, at the Yale New Haven Medical Center and those performed at the Lawrence and memorial Hospital on 08/09/91 and 09/09/92 all reveal a large heart with evidence of some bullous changes consistent with bullous emphysema, with very little evidence for pleural thickening or fibrotic pattern at the extreme lung bases bilaterally. The pattern is not classical for pulmonary asbestosis although the honeycombing at the extreme base is certainly consistent with extensive pulmonary fibrosis from any cause.

A chest film at Saint Francis Hospital and Medical Center on 09/21/92 reveals cardiomegaly with evidence of COPD, minimal pleural thickening on the right and definite early pulmonary fibrosis in the lower third of the lung fields with a non-specific pattern.

"**IMPRESSION:**

1) Diabetes mallitus, insulin dependent, with advanced peripheral vascular disease, status post below the knee amputation right leg.
2) COPD with airway obstruction associated with past cigarette smoking and both bronchitis and bullous emphysema by history and examination.
3) Minimal right pleural thickening with fibrosis and honeycombing of the lower lung fields, consistent with pulmonary fibrosis but non-specific for asbestosis.
4) Status post coronary artery bypass graft with angina pectoris and congestive heart failure, currently controlled, due to ASHD.

"**COMMENTS AND RECOMMENDATIONS:** It is clear that Mr. Baird is disabled for gainful employment where any physical activity is required based not only on his severe reduction in diffusion capacity but also on significant problems with ambulation based on discomfort with his below the knee amputation and prosthesis and ongoing vascular disease. In spite of a severe reduction in diffusion capacity, the diabetes mellitus and progressive vascular disease has been the major mechanism for impairment in terms of coronary artery disease with angina pectoris and bouts of congestive heart failure as well as the long period of vascular insufficiency with gangrene ultimately resulting in below the knee amputation of the right leg as well as the persistent poor peripheral circulation that would limit his activity if his below the knee amputation limitations were not sufficient that he rarely achieves exercise to a point where he has either respiratory impairment or ischemic pain. To approach an estimate of respiratory impairment, using reasonable medical judgement, and the AMA Respiratory Impairment Guidelines, I would estimate the patient

has a loss of 60% of function for both lungs and the whole man based on COPD associated with cigarette smoking with evidence for bullous emphysema by CT scan and airway obstruction by pulmonary function testing, chronic bronchitis by history, restrictive changes associated with recurrent congestive heart failure, and by an unexplained bilateral pulmonary fibrosis with honeycomb lung that may be partly due to asbestosis but which is not sufficiently consistent to be ascribed to asbestosis. Of the 60% impairment for both lungs and the whole man, I consider half of the impairment due to severe COPD, and half to restrictive changes which are due to both recurrent congestive heart failure, but primarily to pulmonary fibrosis with honeycombing. I would therefore consider the pulmonary fibrosis with honeycombing of the lower lung fields to represent a 25% impairment of function for both lungs and the whole person but have difficulty accepting the diagnosis of asbestosis as the primary or sole mechanism. This is because of several problems in the history and findings. Firstly, the patient's actual exposure to asbestos was quite limited and I have rarely seen evidence for asbestosis with such a limited exposure even though he did work as a pipefitter's apprentice and pipefitter for some 15 months or thereabouts. Secondly, there is a remarkable absence of consistent bilateral pleural thickening, an absence of plaque formation, and no evidence for calcification. In addition, the inspiratory rales are not crepitant but in fact medium in quality and not typical for asbestosis. Further, the patient has a history of recurring congestive heart failure and at least one documented bout of pneumonitis at the right base which might be sufficient to cause some permanent damage to an already abnormal lung in a diabetic predisposed to more virulent infections. For all of these reasons I have great difficulty accepting asbestosis as the major mechanism for the pulmonary fibrosis and honeycomb changes noted in the lung bases. I do not doubt that asbestosis is at least an element in these findings but I find the majority of the findings by x-ray and CT scan very atypical and not convincing.

The patient's major problems clearly are the result of diabetes mellitus, heavy smoking history, and progressive peripheral vascular disease, as well as coronary artery disease, all of which have limited his activity to the point where even with a severely reduced diffusion capacity he does not appear to have significant respiratory impairment in his limited daily activities. I believe the medium crackles at lung bases are more consistent with bronchiectasis and a post inflammatory lung than they are with asbestosis.

Certainly Mr. Baird is permanently disabled for gainful employment and will have substantial difficulty even without regular employment in managing his diabetes and preventing further vascular disease and loss of vision as well as ischemia of the left lower leg.

Certainly the early development of COPD with his previous cigarette smoking and more than a decade of peripheral vascular disease with ischemic changes in the lower extremities long preceded the development of his later pulmonary fibrosis and therefore represented pre-existing conditions which resulted in a disability materially and substantially greater than it would have been with his asbestos associated disease alone. In fact, his disability is more based on his diabetes mellitus and peripheral vascular disease as well as an accelerated process both in peripheral vessels and in his lung associated with past cigarette smoking than any fibrosis that could be ascribed to his very limited asbestosis exposure..., according to the doctor.

A copy of that letter was sent to Dr. Peter Gates, Claimant's family physician, and to Claimant's attorney.

Dr. Godar sent the following supplemental letter to the Employer on February 24, 1993 (RX 13):

"Subject: Clarification after review of a case of James M. Baird vs General Dynamics

After discussion of the case of Mr. Baird with reference to whether there is any actual or theoretical pulmonary impairment as a consequence of a limited past asbestos exposure, I would offer the following comments. Firstly, the patient's exposure was indeed very limited but was considered in evaluating the patient's final diagnosis and level of impairment. Secondly, the patient's cardiovascular and peripheral vascular disease secondary to very heavy cigarette smoking was so predominant and so severe that it represented his major impairment. Thirdly, the patient had a history for chronic bronchitis, and restrictive changes were consistent with a history of recurrent congestive heart failure and pulmonary infections resulting in scar. Finally, his rales were more consistent with scar formation and active inflammation than they were with the changes characteristic of asbestosis. In addition, there was no evidence for pleural thickening or calcification as a preceding finding so common in patients who subsequently develop even early pulmonary asbestosis.

All of the above notwithstanding, the patient did have limited exposure to asbestos. Furthermore, **it is not possible to entirely rule out the possibility of early asbestosis as one pathologic finding in the pulmonary fibrosis that appears due to other causes in large measure**. In the absence of lung biopsy or other evidence to totally rule out early asbestos, it is not possible to rule out the presence of even very early disease although it might be so minimal as to defy our ability to assign a percentage impairment to such a finding. (Emphasis added)

It is clear that the diagnosis of early asbestosis and any element of impairment is in itself in doubt but cannot be fully ruled out,

but it is also clear that his disability is not entirely due to asbestosis or asbestos associated disease.

Marilyn H. Dempsky ("Claimant") married James M. Baird ("Decedent") on June 15, 1957 and Claimant was living with Decedent at the time of his death on January 25, 1998. (CX 27) Claimant has been duly appointed as Executrix of Decedent's estate. (CX 26) The Death Certificate certifies "respiratory failure" as the immediate cause of death due to or as a consequence of carcinoma of the lung, and coronary artery disease is listed as another significant condition contributing to death. (CX 24) Funeral expenses exceeded $3,000.00. (CX 25) Claimant has not remarried. (TR 21-23)

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a credible Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **Id.** The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that

(1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984); **Kelaita**, **supra**. Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989); **Kier**, **supra**. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981); **Holmes v. Universal Maritime Serv. Corp.**, 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **Holmes**, **supra**; **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents "specific and comprehensive" evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

Employer contends that Claimant did not establish a **prima facie** case of causation and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. I reject both contentions. The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See**

Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Decedent's statements to establish that he experienced a work-related harm, and as it is undisputed that working conditions occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. §920. What this requirement means is that the employer must offer evidence which completely **rules out the** connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole." **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved

in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As the Employer disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp.**, 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland**, 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997).

In the case **sub judice**, Claimant alleges that the harm to her husband's bodily frame, **i.e.**, his asbestosis and carcinoma of the lung, resulted from working conditions and/or resulted from his exposure to and inhalation of asbestos at the Employer's facility. The Employer has introduced no evidence severing the connection between such harm and Decedent's maritime employment. In this regard, **see Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989). Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et**

al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955); **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

As extensively summarized above, the Employer's medical evidence does not rebut the statutory presumption in Claimant's and Decedent's favor as Dr. Godar could not unequivocally rule out a connection between Decedent's bodily harm and his maritime employment.

Accordingly, this closed record conclusively established, and I so find and conclude, that Decedent's asbestosis and lung cancer resulted from his exposure to asbestos as a maritime employee at the Employer's shipyard, that Decedent's asbestosis was diagnosed on May 25, 1991 by Dr. Louis V. Buckley (CX 7), that the July 2, 1991 CT Scan confirmed that diagnosis (CX 9), that the Employer had timely notice of Decedent's occupational disease on January 30, 1992 (RX 1, block 22), that a dispute arose between the parties and that Decedent timely filed for benefits.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id.** at 1266)

Claimant has the burden of proving the nature and extent of her husband's disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once Claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternate employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternate employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

On the basis of the totality of this closed record, I find and conclude that Claimant has established that her husband could not return to any work after October 29, 1990. The burden thus rests

upon the Employer to demonstrate the existence of suitable alternate employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did not submit any evidence as to the availability of suitable alternate employment. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find Claimant has a total disability, as further discussed below.

Decedent's injury has become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

The Board has held that an irreversible medical condition is permanent **per se**. **Drake v. General Dynamics Corp.**, 11 BRBS 288 (1979). Lung cancer, in my judgment, is such a condition.

The parties have stipulated that Decedent "was paid salary continuation benefits from October 29, 1990 through and including April 27, 1991. He then received long-term disability payments from April 30, 1991 through and including January 25, 1998 (the date of death)." Moreover, "No retirement or disability retirement benefits were ever sought or obtained by Mr. Baird. He did not apply for his retirement from General Dynamics. He collected benefits under the long-term disability plan until his demise." (RX 14)

On the basis of the totality of the record, I find and conclude that Decedent was permanently and totally disabled from October 29, 1990, or when he was forced to discontinue working as a result of his occupational disease.

Average Weekly Wage

For the purposes of Section 10 and the determination of the employee's average weekly wage with respect to a claim for compensation for death or disability due to an occupational disability, the time of injury is the date on which the employee or claimant becomes aware, or on the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. **Todd Shipyards Corp. v. Black**, 717 F.2d 1280 (9th Cir. 1983); **Hoey v. General Dynamics Corporation**, 17 BRBS 229 (1985); **Pitts v. Bethlehem Steel Corp.**, 17 BRBS 17 (1985); **Yalowchuck v. General Dynamics Corp.**, 17 BRBS 13 (1985). A loss of wage-earning capacity is not negated by Claimant's disability status on October 29, 1990 as I have credited his testimony that he was unable to work at that time and would have liked to continue working, especially as he was too young to retire at age fifty-five. **MacDonald v. Bethlehem Steel Corp.**, 18 BRBS 181 (1986).

The Act provides three methods for computing claimant's average weekly wage. The first method, found in Section 10(a) of the Act, applies to an employee who shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during **substantially** the whole of the year immediately preceding his injury. **Mulcare v. E.C. Ernst, Inc.**, 18 BRBS 158 (1987). "Substantially the whole of the year" refers to the nature of Claimant's employment, **i.e.**, whether it is intermittent or permanent, **Eleazar v. General Dynamics Corporation**, 7 BRBS 75 (1977), and presupposes that he could have actually earned wages during all 260 days of that year, **O'Connor v. Jeffboat, Inc.**, 8 BRBS 290, 292 (1978), and that he was not prevented from so working by weather conditions or by the employer's varying daily needs. **Lozupone v. Stephano Lozupone and**

Sons, 12 BRBS 148, 156 and 157 (1979). A substantial part of the year may be composed of work for two different employers where the skills used in the two jobs are highly comparable. **Hole v. Miami Shipyards Corp.**, 12 BRBS 38 (1980), **rev'd and remanded on other grounds**, 640 F.2d 769 (5th Cir. 1981). The Board has held that since Section 10(a) aims at a theoretical approximation of what a claimant could ideally have been expected to earn, time lost due to strikes, personal business, illness or other reasons is not deducted from the computation. **See O'Connor v. Jeffboat, Inc.**, 8 BRBS 290 (1978). **See also Brien v. Precision Valve/Bayley Marine**, 23 BRBS 207 (1990); **Klubnikin v. Crescent Wharf & Warehouse Co.**, 16 BRBS 183 (1984). Moreover, since average weekly wage includes vacation pay in lieu of vacation, it is apparent that time taken for vacation is considered as part of an employee's time of employment. **See Waters v. Farmer's Export Co.**, 14 BRBS 102 (1981), **aff'd per curiam**, 710 F.2d 836 (5th Cir. 1983); **Duncan v. Washington Metropolitan Area Transit Authority**, 24 BRBS 133, 136 (1990); **Gilliam v. Addison Crane Co.**, 21 BRBS 91 (1987). The Board has held that 34.4 weeks' wages do constitute "substantially the whole of the year," **Duncan**, **supra**, but 33 weeks is not a substantial part of the previous year. **Lozupone**, **supra**. Claimant worked for the Employer for the previous fifty-two weeks prior to October 29, 1990. Therefore Section 10(a) is applicable.

In the case at bar the Employer submits that the Decedent is a so-called voluntary retiree and that any benefits awarded herein should be based upon the National Average Weekly Wage as of the date of injury and not his actual wages for the fifty-two weeks prior to October 29, 1990, or $1,143.00. (RX 15)

The 1984 Amendments to the Longshore Act apply a new set of rules in occupational disease cases where the time of injury (**i.e.**, becomes manifest) occurs after claimant has retired. **See Woods v. Bethlehem Steel Corp.**, 17 BRBS 243 (1985); 33 U.S.C. §§902(10), 908(C)(23), 910(d)(2). In such cases, disability is defined under Section 2(10) not in terms of loss of earning capacity, but rather in terms of the degree of physical impairment as determined under the guidelines promulgated by the American Medical Association. An employee cannot receive total disability benefits under these provisions, but can only receive a permanent partial disability award based upon the degree of physical impairment. **See** 33 U.S.C. §908(c)(23); 20 C.F.R. §702.601(b). The Board has held that, in appropriate circumstances, Section 8(c)(23) allows for a permanent partial impairment award based on a one hundred (100) percent physical impairment. **Donnell v. Bath Iron Works Corporation**, 22 BRBS 136 (1989). Further, where the injury occurs more than one year after retirement, the average weekly wage is based on the National Average Weekly Wage as of the date of awareness rather than any actual wages received by the employee. **See** 33 U.S.C. §910(c)(2)(B); **Taddeo v. Bethlehem Steel Corp.**, 22 BRBS 52 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 46 (1989). Thus, it is apparent that Congress, by the 1984 Amendments, intended to expand

the category of claimants entitled to receive compensation to include voluntary retirees.

However, in the case at bar, Claimant may be an involuntary retiree if he left the workforce because of work-related pulmonary problems. Thus, an employee who involuntarily withdraws from the workforce due to an occupational disability may be entitled to total disability benefits although the awareness of the relationship between disability and employment did not become manifest until after the involuntary retirement. In such cases, the average weekly wage is computed under 33 U.S.C. §910(C) to reflect earnings prior to the onset of disability rather than earnings at the later time of awareness. **MacDonald v. Bethlehem Steel Corp.**, 18 BRBS 181, 183 and 184 (1986). **Compare LaFaille v. General Dynamics Corp.**, 18 BRBS 882 (1986), **rev'd in relevant part sub nom. LaFaille v. Benefits Review Board**, 884 F.2d 54, 22 BRBS 108 (CRT) (2d Cir. 1989).

Thus, where disability commences on the date of involuntary withdrawal from the workforce, claimant's average weekly wage should reflect wages prior to the date of such withdrawal under Section 10(c), rather than the National Average Weekly Wage under Section 10(d)(2)(B).

However, if the employee retires due to a non-occupational disability prior to manifestation, then he is a voluntary retiree and is subject to the post-retirement provisions. In **Woods v. Bethlehem Steel Corp.**, 17 BRBS 243 (1985), the Benefits Review Board applied the post-retirement provisions because the employee retired due to disabling non-work-related heart disease prior to the manifestation of work-related asbestosis.

In the case at bar, I find and conclude that Claimant is an involuntary retiree as he stopped working on October 29, 1990, after talking to his doctor two weeks earlier, that he wanted to continue working because he was too young to retire at age 55, that he was given a leave of absence because of "permanent medical disability" (RX 7), that Decedent's May 28, 1991 pulmonary function tests showed "severely" reduced pulmonary capacity (CX 7), that such tests warrant and support the rating of one hundred (100%) percent impairment by Dr. Kaiser sometime thereafter (CX 12-1, CX 13) and that Dr. Godar rating the impairment at sixty (60%) percent of the whole person. Accordingly, I find and conclude that Decedent's impairment can reasonably be rated at eighty (80%) percent (100 + 60 ÷ 2 =) from May 28, 1991 until October 31, 1997, at which time his lung cancer was diagnosed, and on and after that date and until his death on January 25, 1998, Decedent shall be awarded benefits for his one hundred (100%) percent impairment.

Decedent's benefits for his eighty (80%) permanent partial impairment shall begin on May 28, 1991, the date on which Decedent's pulmonary function tests demonstrated a permanent

impairment. In this regard, **see Ponder v. Peter Kiewit Sons' Company**, 24 BRBS 46, 51 (1990).

Claimant's Death Benefits shall begin on January 26, 1998, the day after her husband's death.

Death Benefits and Funeral Expenses Under Section 9

Pursuant to the 1984 Amendments to the Act, Section 9 provides Death Benefits to certain survivors and dependents if a work-related injury causes an employee's death. This provision applies with respect to any death occurring after the enactment date of the Amendments, September 28, 1984. 98 Stat. 1655. The provision that Death Benefits are payable only for deaths due to employment injuries is the same as in effect prior to the 1972 Amendments. The carrier at risk at the time of decedent's injury, not at the time of death, is responsible for payment of Death Benefits. **Spence v. Terminal Shipping Co.**, 7 BRBS 128 (1977), **aff'd sub. nom. Pennsylvania National Mutual Casualty Insurance Co. v. Spence**, 591 F.2d 985, 9 BRBS 714 (4th Cir. 1979), **cert. denied**, 444 U.S. 963 (1975); **Marshall v. Looney's Sheet Metal Shop**, 10 BRBS 728 (1978), **aff'd sub. nom. Travelers Insurance Co. v. Marshall**, 634 F.2d 843, 12 BRBS 922 (5th Cir. 1981).

A separate Section 9 claim must be filed in order to receive benefits under Section 9. **Almeida v. General Dynamics Corp.**, 12 BRBS 901 (1980). This Section 9 claim must comply with Section 13. **See Wilson v. Vecco Concrete Construction Co.**, 16 BRBS 22 (1983); **Stark v. Bethlehem Steel Corp.**, 6 BRBS 600 (1977). Section 9(a) provides for reasonable funeral expenses not exceeding $3,000. 33 U.S.C.A. §909(a) (West 1986). Prior to the 1984 Amendments, this amount was $1,000. This subsection contemplates that payment is to be made to the person or business providing funeral services or as reimbursement for payment for such services, and payment is limited to the actual expenses incurred up to $3,000. Claimant is entitled to appropriate interest on funeral benefits untimely paid. **Adams v. Newport News Shipbuilding and Dry Dock Company**, 22 BRBS 78, 84 (1989).

Section 9(b) which provides the formula for computing Death Benefits for surviving spouses and children of Decedents must be read in conjunction with Section 9(e) which provides minimum benefits. **Dunn v. Equitable Equipment Co.**, 8 BRBS 18 (1978); **Lombardo v. Moore-McCormack Lines, Inc.**, 6 BRBS 361 (1977); **Gray v. Ferrary Marine Repairs**, 5 BRBS 532 (1977).

Section 9(e), as amended in 1984, provides a maximum and minimum death benefit level. Prior to the 1972 Amendments, Section 9(e) provided that in computing Death Benefits, the average weekly wage of Decedent could not be greater than $105 nor less than $27, but total weekly compensation could not exceed Decedent's weekly wages. Under the 1972 Amendments, Section 9(e) provided that in computing Death Benefits, Decedent's average weekly wage shall not be less than the National Average Weekly Wage under Section 6(b), but that the weekly death benefits shall not exceed decedent's actual average weekly wage. **See Dennis v. Detroit Harbor Terminals**, 18 BRBS 250 (1986), **aff'd sub nom. Director, OWCP v.**

Detroit Harbor Terminals, Inc., 850 F.2d 283 21 BRBS 85 (CRT) (6th Cir. 1988); **Dunn**, **supra**; **Lombardo**, **supra**; **Gray**, **supra**.

In **Director, OWCP v. Rasmussen**, 440 U.S. 29, 9 BRBS 954 (1979), **aff'g** 567 F.2d 1385, 7 BRBS 403 (9th Cir. 1978), **aff'g sub. nom. Rasmussen v. GEO Control, Inc.**, 1 BRBS 378 (1975), the Supreme Court held that the maximum benefit level of Section 6(b)(1) did not apply to Death Benefits, as the deletion of a maximum level in the 1972 Amendment was not inadvertent. The Court affirmed an award of $532 per week, two-thirds of the employee's $798 average weekly wage.

However, the 1984 amendments have reinstated that maximum limitation and Section 9(e) currently provides that average weekly wage shall not be less than the National Average Weekly Wage, but benefits may not exceed the lesser of the average weekly wage of Decedent or the benefits under Section 6(b)(1).

In view of these well-settled principles of law, I find and conclude that Claimant, as the surviving Widow of Decedent, is entitled to an award of Death Benefits, commencing on January 26, 1998, the date after her husband's death, based upon the Decedent's average weekly wage $1,143.OO as of that date, pursuant to Section 9, as I find and conclude that Decedent's death resulted from a combination of his work-related pulmonary asbestosis and his cardiovascular disease. While the Death Certificate certifies as the immediate cause of death, respiratory failure due to lung cancer, (CX 24), Dr. Gates has identified Decedent's coronary artery disease was a significant contributory factor to the death on January 25, 1998. Thus, I find and conclude that Decedent's death resulted from and was related to his work-related injury for which his estate will be receiving permanent partial benefits from May 28, 1991 until his death on January 25, 1998.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for

reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, **supra**.

It is well-settled that the Act does not require that an injury be disabling for a claimant to be entitled to medical expenses; it only requires that the injury be work related. **Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989); **Winston v. Ingalls Shipbuilding**, 16 BRBS 168 (1984); **Jackson v. Ingalls Shipbuilding**, 15 BRBS 299 (1983).

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised the Employer of her husband's work-related

injury on January 30, 1992 and requested appropriate medical care and treatment. However, the Employer did not accept the claim and did not authorize such medical care. Thus, any failure by Claimant to file timely the physician's report is excused for good cause as a futile act and in the interests of justice as the Employer refused to accept the claim.

Accordingly, the Employer is responsible for the reasonable and necessary medical expenses in the diagnosis, evaluation and treatment of Decedent's asbestosis and his lung cancer between May 29, 1991, the date of his injury, and his death on January 25, 1998, all of which expenses are subject to the provisions of Section 8(f) of the Act.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Employer timely controverted the entitlement to benefits by Claimant and Decedent. (RX 3, RX 4, RX 5) **Ramos v. Universal**

Dredging Corporation, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Section 8(f) of the Act

Regarding the Section 8(f) issue, the essential elements of that provision are met, and employer's liability is limited to one hundred and four (104) weeks, if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury and (3) which combined with the subsequent injury to produce or increase the employee's permanent total or partial disability, a disability greater than that resulting from the first injury alone. **Lawson v. Suwanee Fruit and Steamship Co.**, 336 U.S. 198 (1949); **FMC Corporation v. Director, OWCP**, 886 F.2d 1185, 23 BRBS 1 (CRT) (9th Cir. 1989); **Director, OWCP v. Cargill, Inc.**, 709 F.2d 616 (9th Cir. 1983); **Director, OWCP v. Newport News & Shipbuilding & Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982); **Director, OWCP v. Sun Shipbuilding & Dry Dock Co.**, 600 F.2d 440 (3rd Cir. 1979); **C & P Telephone v. Director, OWCP**, 564 F.2d 503 (D.C. Cir. 1977); **Equitable Equipment Co. v. Hardy**, 558 F.2d 1192 (5th Cir. 1977); **Shaw v. Todd Pacific Shipyards**, 23 BRBS 96 (1989); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **McDuffie v. Eller and Co.**, 10 BRBS 685 (1979); **Reed v. Lockheed Shipbuilding & Construction Co.**, 8 BRBS 399 (1978); **Nobles v. Children's Hospital**, 8 BRBS 13 (1978). The provisions of Section 8(f) are to be liberally construed. **See Director v. Todd Shipyard Corporation**, 625 F.2d 317 (9th Cir. 1980). The benefit of Section 8(f) is not denied an employer simply because the new injury merely aggravates an existing disability rather than creating a separate disability unrelated to the existing disability. **Director, OWCP v. General Dynamics Corp.**, 705 F.2d 562, 15 BRBS 30 (CRT) (1st Cir. 1983); **Kooley v. Marine Industries Northwest**, 22 BRBS 142, 147 (1989); **Benoit v. General Dynamics Corp.**, 6 BRBS 762 (1977).

The employer need not have actual knowledge of the pre-existing condition. Instead, "the key to the issue is the availability to the employer of knowledge of the pre-existing condition, not necessarily the employer's actual knowledge of it." **Dillingham Corp. v. Massey**, 505 F.2d 1126, 1228 (9th Cir. 1974). Evidence of access to or the existence of medical records suffices to establish the employer was aware of the pre-existing condition. **Director v. Universal Terminal & Stevedoring Corp.**, 575 F.2d 452 (3d Cir. 1978); **Berkstresser v. Washington Metropolitan Area Transit Authority**, 22 BRBS 280 (1989), **rev'd and remanded on other grounds sub nom. Director v. Berstresser**, 921 F.2d 306 (D.C. Cir. 1990); **Reiche v. Tracor Marine, Inc.**, 16 BRBS 272, 276 (1984); **Harris v. Lambert's Point Docks, Inc.**, 15 BRBS 33 (1982), **aff'd**, 718 F.2d 644 (4th Cir. 1983); **Delinski v. Brandt Airflex Corp.**, 9 BRBS 206 (1978). Moreover, there must be information available which alerts the employer to the existence of a medical condition. **Eymard & Sons Shipyard v. Smith**, 862 F.2d 1220, 22 BRBS 11 (CRT) (5th Cir. 1989); **Armstrong v. General Dynamics Corp.**, 22 BRBS 276 (1989); **Berkstresser**, **supra**, at 283; **Villasenor v. Marine Maintenance Industries**, 17 BRBS 99, 103 (1985); **Hitt v. Newport**

News Shipbuilding and Dry Dock Co., 16 BRBS 353 (1984); **Musgrove v. William E. Campbell Company**, 14 BRBS 762 (1982). A disability will be found to be manifest if it is "objectively determinable" from medical records kept by a hospital or treating physician. **Falcone v. General Dynamics Corp.**, 16 BRBS 202, 203 (1984). Prior to the compensable second injury, there must be a medically cognizable physical ailment. **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **Brogden v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 259 (1984); **Falcone**, **supra**.

The pre-existing permanent partial disability need not be economically disabling. **Director, OWCP v. Campbell Industries**, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), **cert. denied**, 459 U.S. 1104 (1983); **Equitable Equipment Company v. Hardy**, 558 F.2d 1192, 6 BRBS 666 (5th Cir. 1977); **Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2d 602 (3d Cir. 1976).

An x-ray showing pleural thickening, followed by continued exposure to the injurious stimuli, establishes a pre-existing permanent partial disability. **Topping v. Newport News Shipbuilding**, 16 BRBS 40 (1983); **Musgrove v. William E. Campbell Co.**, 14 BRBS 762 (1982).

Section 8(f) relief is not applicable where the permanent total disability is due **solely** to the second injury. In this regard, **see Director, OWCP (Bergeron) v. General Dynamics Corp.**, 982 F.2d 790, 26 BRBS 139 (CRT) (2d Cir. 1992); **Luccitelli v. General Dynamics Corp.**, 964 F.2d 1303, 26 BRBS 1 (CRT) (2d Cir. 1992); **CNA Insurance Company v. Legrow**, 935 F.2d 430, 24 BRBS 202 (CRT) (1st Cir. 1991). In addressing the contribution element of Section 8(f), the United States Court of Appeals for the Second Circuit, in whose jurisdiction the instant case arises, has specifically stated that the employer's burden of establishing that a claimant's subsequent injury alone would not have caused claimant's permanent total disability is not satisfied merely by showing that the pre-existing condition made the disability worse than it would have been with only the subsequent injury. **See Director, OWCP v. General Dynamics Corp. (Bergeron)**, **supra**.

On the basis of the totality of the record, I find and conclude that the Employer has satisfied these requirements. The record reflects (1) that Decedent worked for the Employer from October 1, 1953 through October 28, 1990, (2) that Decedent's coronary leg problems became manifest on October 19, 1970 with leg swelling (RX 9-1), (3) that his July 29, 2971 interval physical examination at the shipyard revealed pulmonary lesions (RX 9-2), (4) that that physical also revealed lumbar problems and diabetes (RX 9-4), (5) that the Employer accepted Decedent's return to work on July 24, 1972 after his coronary attack (RX 9-6, 7), (6) that he was out of work from February 20, 1976 through March 21, 1976 and was being treated by Dr. Sutton (RX 9-8, RX 10), (7) that Decedent's October 1, 1976 chest x-ray was read as abnormal and he

was referred to his own doctor (RX 9-10; CX 1, CX 2), (8) that similar changes were seen on his serial chest x-rays (CX 4) and interval physical examinations (RX 9 at 11-23), (9) that Decedent underwent three surgical procedures on his right leg and the Employer retained him as a valued employee (RX 9-24) in 1983 (RX 9-24), in 1988 (RX 9-25), in 1985 (RX 9-26), in 1986 (RX 9-29), (10) that Decedent's diabetes had been treated with insulin since at least April 13, 1982 (RX 11-1), (11) that Dr. Gates treated Decedent's various medical problems between that date and at least May 11, 1992 (RX 11), (12) that the Employer retained Decedent as a valued employee even with actual knowledge of his multiple medical problems, including a right leg prosthesis, (13) that Decedent's permanent partial impairment is the result of the combination of his pre-existing permanent partial disability (**i.e.**, the above-enumerated medical problems) and his May 28, 1991 injury as such pre-existing disability, in combination with the subsequent work injury, has contributed to a greater degree of permanent disability, according to Dr. Godar. (RX 12, RX 13) **See Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2d 602, 4 BRBS 79 (3d Cir. 1976); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989).

Decedent's condition, prior to his final injury on May 28, 1991, was the classic condition of a high-risk employee whom a cautious employer would neither have hired nor rehired nor retained in employment due to the increased likelihood that such an employee would sustain another occupational injury. **C & P Telephone Company v. Director, OWCP**, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977), **rev'g in part**, 4 BRBS 23 (1976); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Hallford v. Ingalls Shipbuilding**, 15 BRBS 112 (1982).

Even in cases where Section 8(f) is applicable, the Special Fund is not liable for medical benefits. **Barclift v. Newport News Shipbuilding & Dry Dock Co.**, 15 BRBS 418 (1983), **rev'd on other grounds sub nom. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.**, 737 F.2d 1295 (4th Cir. 1984); **Scott v. Rowe Machine Works**, 9 BRBS 198 (1978); **Spencer v. Bethlehem Steel Corp.**, 7 BRBS 675 (1978).

The Board has held that an employer is entitled to interest, payable by the Special Fund, on monies paid in excess of its liability under Section 8(f). **Campbell v. Lykes Brothers Steamship Co., Inc.**, 15 BRBS 380 (1983); **Lewis v. American Marine Corp.**, 13 BRBS 637 (1981).

The Special Fund is responsible for all of the compensation and Death Benefits awarded herein because the Benefits Review Board has held "that in cases where permanent partial disability is followed by permanent total disability and Section 8(f) is applicable to both periods of disability, employer is liable for only one period of 104 weeks. **Davenport v. Apex Decorating Company**, 18 BRBS 194 (1986); **Huneycutt v. Newport News Shipbuilding**

and Dry Dock Company, 17 BRBS 142 (1985); **Sawyer v. Newport News Shipbuilding and Dry Dock Company**, 15 BRBS 270 (1982); **Graziano v. General Dynamics Corp.**, 14 BRBS 950 (1982) (**Decision and Order on Remand**); **Cabe v. Newport News Shipbuilding and Dry Dock Co.**, 13 BRBS 1144 (1981).

Section 8(f) relief is not available to the employer simply because it is the responsible employer or carrier under the last employer rule promulgated in **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied sub nom. Ira S. Bushey Co. v. Cardillo**, 350 U.S. 913 (1955). The three-fold requirements of Section 8(f) must still be met. **Stokes v. Jacksonville Shipyards, Inc.**, 18 BRBS 237, 239 (1986), **aff'd sub nom. Jacksonville Shipyards, Inc. v. Director**, 851 F.2d 1314, 21 BRBS 150 (CRT) (11th Cir. 1988).

In **Huneycutt v. Newport News Shipbuilding & Dry Dock Co.**, 17 BRBS 142 (1985), the Board held that where permanent partial disability is followed by permanent total disability and Section 8(f) is applicable to both periods of disability, employer is liable for only one period of 104 weeks. In **Huneycutt**, the claimant was permanently partially disabled due to asbestosis and then became permanently totally disabled due to the same asbestosis condition, which had been further aggravated and had worsened. Thus, in **Davenport v. Apex Decorating Co.**, 18 BRBS 194 (1986), the Board applied **Huneycutt** to a case involving permanent partial disability for a hip problem arising out of a 1971 injury and a subsequent permanent total disability for the same 1971 injury. **See also Hickman v. Universal Maritime Service Corp.**, 22 BRBS 212 (1989); **Adams v. Newport News Shipbuilding and Dry Dock Company**, 22 BRBS 78 (1989); **Henry v. George Hyman Construction Company**, 21 BRBS 329 (1988); **Bingham v. General Dynamics Corp.**, 20 BRBS 198 (1988); **Sawyer v. Newport News Shipbuilding and Dry Dock Co.**, 15 BRBS 270 (1982); **Graziano v. General Dynamics Corp.**, 14 BRBS 950 (1982) (where the Board held that where a total permanent disability is found to be compensable under Section 8(a), with the employer's liability limited by Section 8(f) to 104 weeks of compensation, the employer will not be liable for an additional 104 weeks of death benefits pursuant to Section 9 where the death is related to the injury compensated under Section 8 as both claims arose from the same injury which, in combination with a pre-existing disability resulted in total disability and death); **Cabe v. Newport News Shipbuilding and Dry Dock Co.**, 13 BRBS 1029 (1981); **Adams**, **supra**.

However, the Board did not apply **Huneycutt** in **Cooper v. Newport News Shipbuilding & Dry Dock Co.**, 18 BRBS 284, 286 (1986), where claimant's permanent partial disability award was for asbestosis and his subsequent permanent total disability award was precipitated by a totally new injury, a back injury, which was unrelated to the occupational disease. While it is consistent with the Act to assess employer for only one 104 week period of liability for all disabilities arising out of the same injury or

occupational disease, employer's liability should not be so limited when the subsequent total disability is caused by a new distinct traumatic injury. In such a case, a new claim for a new injury must be filed and new periods should be assessed under the specific language of Section 8(f). **Cooper**, **supra**, at 286.

Moreover, employer's liability is not limited pursuant to Section 8(f) where claimant's disability did not result from the combination or coalescence of a prior injury with a subsequent one. **Two "R" Drilling Co. v. Director, OWCP**, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1990); **Duncanson-Harrelson Company v. Director, OWCP and Hed and Hatchett**, 644 F.2d 827 (9th Cir. 1981). Moreover, the employer has the burden of proving that the three requirements of the Act have been satisfied. **Director, OWCP v. Newport News Shipbuilding and Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982). Mere existence of a prior injury does not, **ipso facto**, establish a pre-existing disability for purposes of Section 8(f). **American Shipbuilding v. Director, OWCP**, 865 F.2d 727, 22 BRBS 15 (CRT) (6th Cir. 1989). Furthermore, the phrase "existing permanent partial disability" of Section 8(f) was not intended to include habits which have a medical connection, such as a bad diet, lack of exercise, drinking (but not to the level of alcoholism) or smoking. **Sacchetti v. General Dynamics Corp.**, 14 BRBS 29, 35 (1981); **aff'd**, 681 F.2d 37 (1st Cir. 1982). Thus, there must be some pre-existing physical or mental impairment, **viz**, a defect in the human frame, such as alcoholism, diabetes mellitus, labile hypertension, cardiac arrhythmia, anxiety neurosis or bronchial problems. **Director, OWCP v. Pepco**, 607 F.2d 1378 (D.C. Cir. 1979), **aff'g**, 6 BRBS 527 (1977); **Atlantic & Gulf Stevedores, Inc. v. Director, OWCP**, 542 F.2d 602 (3d Cir. 1976); **Parent v. Duluth Missabe & Iron Range Railway Co.**, 7 BRBS 41 (1977). As was succinctly stated by the First Circuit Court of Appeals, ". . . smoking cannot become a qualifying disability [for purposes of Section 8(f)] until it results in medically cognizable symptoms that physically impair the employee." **Sacchetti**, **supra**, at 681 F.2d 37.

As Decedent was a voluntary retiree and as benefits are being awarded under Section 8(c)(23) for Decedent's lung cancer (CX 24), only Decedent's prior pulmonary problems can qualify as a pre-existing permanent partial disability, which, together with subsequent exposure to the injurious stimuli, would thereby entitle the Employer to Section 8(f) relief. In this regard, **see Adams v. Newport News Shipbuilding and Dry Dock Company**, 22 BRBS 78, 85 (1989).

In **Adams**, the Benefits Review Board held at page 85:

"Regarding Section 8(f) relief and the Section 8(c)(23) claim, we hold, as a matter of law, that Decedent's pre-existing hearing loss, lower back difficulties, anemia and arthritis are not pre-existing permanent partial disabilities which can entitle Employer to Section 8(f) relief because they cannot contribute to Claimant's

disability under Section 8(c)(23). A Section 8(c)(23) award provides compensation for permanent partial disability due to occupational disease that becomes manifest after voluntary retirement. **See**, **e.g.**, **MacLeod v. Bethlehem Steel Corp.**, 20 BRBS 234, 237 (1988); **see also** 33 U.S.C. §§908(c)(23), 910(d)(2). Compensation is awarded based solely on the degree of permanent impairment arising from the occupational disease. **See** 33 U.S.C. §908(c)(23). Section 8(f) relief is only available where claimant's disability is not due to his second injury alone. In a Section 8(c)(23) case, a pre-existing hearing loss, or back, arthritic or anemic conditions have no role in the award and cannot contribute to a greater degree of disability, since only the impairment due to occupational lung disease is compensated. In the instant case, therefore, only Decedent's pre-existing COPD could have combined with Decedent's mesothelioma to cause a materially and substantially greater degree of occupational disease-related disability. Accordingly, Decedent's other pre-existing disabilities cannot serve as a basis for granting Section 8(f) relief on the Section 8(c)(23) claim. Similarly, with regard to Section 8(f) relief and the Section 9 Death Benefits claim, only Decedent's COPD could, as a matter of law, be a pre-existing disability contributing to Decedent's death in this case. The evidence of record establishes a contribution from the COPD to Decedent's death, in addition to respiratory failure from mesothelioma. **See generally Dugas (v. Durwood Dunn, Inc.)**, **supra**, 21 BRBS at 279."

Moreover, the Benefits Review Board has held, as a matter of law, that a decedent's pre-existing hearing loss, lower back difficulties, anemia and arthritis are not pre-existing permanent partial disabilities which can entitle employer to Section 8(f) relief because they **cannot contribute** to decedent's disability under Section 8(c)(23). **Adams v. Newport News Shipbuilding and Dry Dock Company**, 22 BRBS 78, 85 (1989). In **Adams**, the Board held that Section 8(c)(23) compensates "only the impairment due to occupational lung disease" and "only decedent's pre-existing COPD (chronic obstructive pulmonary disease) could have combined with decedent's mesothelioma to cause a materially and substantially greater disease of occupational disease-related disability. Accordingly, decedent's other pre-existing disabilities cannot serve as a basis for granting Section 8(f) relief on the Section 8(c)(23) claim. Similarly, with regard to a Section 9 Death Benefits claim, only decedent's COPD could, as a matter of law, be a pre-existing disability contributing to decedent's death in this case." **Adams**, **supra**, at 85.

The Benefits Review Board has held that the Administrative Law Judge erred in setting a 1979 commencement date for the permanent partial disability award under Section 8(c)(23) since x-ray evidence of pleural thickening alone is not a basis for a permanent impairment rating under the AMA Guides. Therefore, where the first medical evidence of record sufficient to establish a permanent

impairment of decedent's lungs under the AMA Guides was an April 1985 medical report which stated that decedent had disability of his lungs, the Board held that the permanent partial disability award for asbestos-related lung impairment should commence on March 5, 1985 as a matter of law. **Ponder v. Peter Kiewit Sons' Company**, 24 BRBS 46, 51 (1990).

In the case at bar, Section 8(f) is applicable to the claim filed by the Decedent and it also applies to the Claimant's claim for Death Benefits because his lifetime benefits are being paid for his COPD, his cardiac problems and his lung cancer and because death was due to the combination of the lung cancer, the asbestosis and Decedents right leg advanced arteriosclerosis and to his cardiac problems. Thus, the Employer's obligation is limited to the payment of 104 weeks of permanent benefits.

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer. Claimant's attorney filed two fee applications on November 12, 1999, the first relating to 1999-LHC-1312 (CX 32) and the other relating to 1999-LHC-1311 (CX 33), concerning services rendered and costs incurred in representing Claimant between August 14, 1998 and October 5, 1999 and August 16, 1999 and November 9, 1999. Attorney Carolyn P. Kelly seeks fees of $2,746.25 (CX 32) and $1,855.10 (including expenses) based on 24 hours of attorney time and 2 hours of paralegal time at various hourly rates.

The Employer has not objected to the requested attorney's fees. (RX 16)

In accordance with established practice, I will consider only those services rendered and costs incurred after August 12, 1998, the date of the informal conference. Services rendered prior to this date should be submitted to the District Director for her consideration.

In light of the nature and extent of the excellent legal services rendered to Claimant by her attorney, the amount of compensation obtained for Claimant and the Employer's comments on the requested fee, I find a legal fee of $4,601.35 (including expenses of $51.35) is reasonable and in accordance with the criteria provided in the Act and regulations, 20 C.F.R. §702.132, and is hereby approved. The expenses are approved as reasonable and necessary litigation expenses.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation

order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore ORDERED that:

1. The Employer as a self-insurer shall pay to Claimant as Executrix of Decedent's estate compensation for his eighty (80%) percent permanent partial impairment from May 28, 1991 through October 30, 1997, based upon the Decedent's average weekly wage of $1,143.00, such compensation to be computed in accordance with Sections 8(c)(23) and (2)(10) of the Act.

2. The Employer as a self-insurer shall pay to Claimant as Executrix of Decedent's estate compensation for his one hundred (100%) percent permanent partial impairment from October 31, 1997 through January 25, 1998, based upon the Decedent's average weekly wage of $1,143.00, such compensation to be computed in accordance with Sections 8(c)(23) and (2)(10) of the Act.

3. The Employer shall also pay Decedent's widow, Marilyn H. Baird, ("Claimant"), Death Benefits from January 26, 1998, based upon the National Average Weekly Wage of $1,143.00, in accordance with Section 9 of the Act, and such benefits shall continue for as long as she is eligible therefor.

4. The Employer's obligation herein is limited to the payment of 104 weeks of permanent benefits and after the cessation of payments by the Employer, continuing benefits shall be paid, pursuant to Section 8(f) of the Act, from the Special Fund established in Section 44 of the Act until further ORDER.

5. The Employer shall reimburse or pay Claimant reasonable funeral expenses of $3,000.00, pursuant to Section 9(a) of the Act.

6. The Employer shall receive credit for all amounts of compensation previously paid to the Claimant as a result of his May 28, 1991 injury on and after May 28, 1991, and the parties have also stipulated that the Employer is entitled to a credit of $30,726.02, less any "unreimbursed medicals," relating to so-called third party recoveries. (TR 14)

7. Interest shall be paid by the Employer and Special Fund on any accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director. Interest shall also be paid on the funeral benefits untimely paid by the Employer.

8. The Employer shall pay for such reasonable, appropriate and necessary medical care and treatment as the Decedent's work-related injury referenced herein may have required between May 28,

1991 and January 25, 1998, even after the time period specified in the fourth Order provision above, subject to the provisions of Section 7 of the Act.

9. The Employer shall pay to Claimant's attorney, Carolyn P. Kelly, the sum of $4,601.35 (including expenses) as a reasonable fee for representing Claimant herein before the Office of Administrative Law Judges between August 14, 1998 and October 5, 1999 and August 16, 1999 and November 9, 1999.

_____

DAVID W. DI NARDI
Administrative Law Judge

Dated:

Boston, Massachusetts

DWD:ln